No. 11,756

In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE ALASKA WORLD WAR II VETERANS' BOARD AND ROBERT E. ELLIS, JOHN S. HELLENTHAL, JOHN M. CROSS, L. EMBERT DEMMERT AND PAUL SOLKA, JR., members of said Board, and NORMAN HALEY, Executive Officer of said board,

Appellants,

vs.

TERRITORY OF ALASKA ex rel. OSCAR G. OLSON,

Appellee.

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NO. 1

BRIEF FOR APPELLEE

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THE PLEADINGS

The Territory of Alaska, ex rel Oscar G. Olson (Territorial Treasurer), plaintiff below, brings this action for a peremptory Writ of Mandamus ordering the defendants, The Alaska World War II Veterans' Board and the members thereof, to pay into the Treasury of the Territory of Alaska the sum of $350,000.00 which had been appropriated by the Alaska Legislature as an initial implementation of the Territorial Veterans' Loan and Bonus program. The pleadings refer to Chapter 27 Session Laws of Alaska 1946, which contains the appropriation in question, and in which pertinent statutory provisions are found. The complaint proceeds on the basis that the facts alleged coupled with the mandatory language of that portion of the Act which pertains to repayment show a clear duty on the part of the Board to honor the Territory's demand and bring about issuance of appropriate vouchers by the Board's administrative officer. Briefly stated, the Board contends that the statute is not mandatory but vests the Board with full discretion in determinning when the loan in question should be repaid within the prescribed four-year maximum period.

THE ISSUE OF LAW

If the Legislature has given the Board full discretion, as contended by counsel for appellants, then the Court would not interfere and mandamus would not be a proper remedy. However, if the duty to perform

the repayment function as requested by the Territory is clear, then mandamus would lie and the decision of the Court below should be affirmed.

STATEMENT OF FACTS

As stated by counsel in the appellants' brief, there is no dispute as to the pertinent facts:

The Alaska World War II Veterans' Act (Chapter 27, Session Laws of Alaska, 1946) was passed in April of 1946; Section 3 of said Act does contain a tax on sales and services to raise the necessary funds for loans and bonuses to Alaska's veterans of World War II and an appropriation in the sum of $350,000.00 was made for deposit in the Alaska World War II Veterans' Revolving Fund to be used for the purposes of the Act; said money was advanced by the Territorial Treasury for said fund; demand was made for repayment, and repayment refused as alleged in the complaint. (Trans. P. 4).

Not covered by counsel, however, in appellants' statement is the following material provision found in Section 3 of the Act:

> "This tax shall terminate at the end of the quarter during which three million two hundred fifty thousand dollars ($3,250,000.00) or more has been collected hereunder, and the money derived from said tax shall be used for no purposes other than to carry out the provisions of the Alaska World War II Veterans' Act."

This is important because the Court would wish to notice proximity of full accomplishment of the tax levy. As stated in the complaint, one and three-quarter million dollars had been collected by the 18th day of August, 1947, with another $300,000.00 forthcoming as receipts for the third quarter, during October of 1947, making a total of $2,050,000.00 in applicable tax collections referred to in the pleadings. (Trans. p. 3). Further consideration of the record shows that the writ (Trans. p. 19) called for payment of an installment in the amount of $175,000.00 by January 31, 1948, which would come at a time when the tax for the fourth quarter of 1947 had been collected. The writ also calls for payment of the remaining $175,000.00 by April 30, 1948, at a time when the tax for the first quarter of 1948 will have been collected, by which time about $2,700,000.00 of the tax will be in, leaving a duration of only two more calendar quarters on the life of the tax during which a total amount of more than $3,250,000.00 will have been collected.

Although counsel mentions on page 4 of appellants' brief that a serious financial shortage exists in the general fund of the Territory, some amplification of that point is in order. Witnesses heard by the Court below testified that revenues for the General Fund were falling seriously short of amounts needed to meet necessary appropriations for the biennium ending March 31, 1949, and that as a result there was already a shortage of money to meet general operating

expenses of the Territory. It was also testified that vouchers in the amount of approximately $100,000.00 had already stacked up in the Auditor's office; that vouchering for overdue school refunds to incorporated towns had been deferred, and that the usual governmental functions and social service were jeopardized. This is brought out because we will show later on in this brief that the Court may properly consider the public interest in determining a mandamus case.

ARGUMENT AND AUTHORITIES

To determine the question as to whether mandamus is a proper remedy in the instant case, we should look to the Alaska statute on the subject, which is compiled as Section 4116 Compiled Laws of Alaska, 1933, and reads as follows:

> "TO WHOM WRIT MAY ISSUE; NOT TO CONTROL JUDICIAL DISCRETION. It may be issued to any inferior court, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. But though the writ may require such court, corporation, board, officer, or person to exercise its or his judgment, or proceed to the discharge of any of its or his *functions*, it shall not control *judicial discretion*. The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law."
>
> (Italics ours.)

We recognize the usual rule cited by counsel that performance of only ministerial duties may be com-

pelled by mandamus. However, the courts cannot avoid borderline cases involving possible elements of discretion. Therefore, resort should be had to the local statute involved to determine strictness of ministeriality which is required in the jurisiction in which a particular case arises. Inasmuch as the Court may, under the Alaska statute above cited, require a board etc. to "proceed to the discharge of any of its or his *functions*" and inasmuch as said statute specifically prohibits only control of "judicial discretion" to the exclusion of varying degrees of administrative discretion, the conclusion is inescapable that adherence to a strict conception of ministeriality is not called for under Alaska law as a prerequisite to granting the writ, especially where the duty is clear and the interest of the general public is definitely at stake. In this connection the word "function" is defined in Funk & Wagnall's unabridged Dictionary of 1913 as

> "An activity rightfully belonging to a person or thing; one's proper business, duty, part or office."

It is the contention of the Territory that the veterans' tax revenue collected as above set forth in the statement of facts clearly "permits" payment in accordance with the terms of the writ and that the mandatory language of Section 5 of Chapter 27 Session Laws of Alaska, 1946, establishes a clear duty upon the Board to cause issuance of the vouchers necesssary

for repayment to the General Fund of the Territory. Said Section 5 follows with italics supplied for emphasis:

> "APPROPRIATION. There is hereby appropriated the sum of three hundred fifty thousand dollars ($350,000.00) for deposit in the Alaska World War II Veterans' Revolving Fund to be used for the purpose of this Act, including expenses of administration; provided, however, that the Board *shall* pay back such sum to the Territorial Treasury *as soon as* revenues collected through the tax imposed by this Act *will permit*, but not later than four years after the effective date hereof."

The word "shall" is amply defined in *Words and Phrases*, Vol. 39, as *mandatory*. See 1947 Cumulative pocket part of said volume, pages 17 and 18, from which we obtain the following:

> "The word 'shall' is equivalent to the word 'must'."
>
> *Bateman v. Smith, Tenn.*, 194 S.W. 2d 336.

> "The word 'shall' has a peremptory, imperative, compulsory, and mandatory sense as opposed to a permissive sense."
>
> *Weill v. Centralia Service & Oil Co.*, 51 N.E. 2d 345, 347; 320 Ill. App. 397.

> " 'Shall' is the ordinary word used in connection with a mandate."
>
> *City of Lebanon vs. Dale*, 46 N.E. 2nd 269, 272; 113 Ind. App. 173.

> "The verb 'shall' in statute is 'mandatory' when public welfare requires that it be given such meaning."
>
> *In re Fear*, 26 A. 2nd 457, 459, 344 Pac. 624.

Appellants have contended in effect that the word "shall" is modified by the language, "but not later than four years after the effective date hereof." Appellee, the Territory, points out that such words merely express a maximum period at the expiration of which payment must be made even if it took the last dollar out of the Veterans' Fund, and the Territory contends that in consideration of the facts and general public welfare, the mandatory language of Section 5 has become presently effective and enforceable without awaiting expiration of the maximum period.

We now look at the meaning of the word "permit". Synonyms given by Soule's Dictionary of English Synonyms are as follows:

> "Allow, let, suffer, tolerate, endure."

Rewritten, the controlling words of Section 5 would be, "must pay back as soon as revenues will allow, let, suffer, tolerate or endure."

Now counsel contends in appellants' brief, P. 10, that the mandatory language of the section is meaningless because it did not specify that payment had to be made when any particular portion of the tax revenues had been collected or when a certain percentage of veterans' applications have been acted upon. Coun-

sel also draws the same conclusion because the Act "does not say that the appropriation shall be paid back at any particular time." Counsel then argues that the Act "certainly leaves to the discretion of some person or some board or body to say when the revenues collected through the tax imposed will permit the repayment of the appropriation."

Appellee agrees that a demand for payment when only the first $350,000.00 had been collected under the tax would have been premature as payment then would have stopped all functioning of the veterans' program. It was obviously the intent of the legislature that the program should be kept going, and it was apparent at the outset that the time would come when there would be a borderline stage unsusceptible to easy determination on the question of whether revenues derived from the tax would then "permit" of repayment. Only then would the discretion of the Board have been invokeable to ascertain its duty in the premises. However, demand was not made at such borderline stage. It was made at a time when more than 50% of the tax had been collected and the writ orders installment payments at calendar quarter intervals, the last of which will fall when nearly $3,000,000.00 of the tax will have been collected. Furthermore, the case in the Court below was heard at a time when the Board had enough money on hand to pay the amount in full, although the demand was restricted to only a 50% immediate collection with the balance deferred for three months.

Compliance with the terms of the demand would have allowed uninterrupted continuance of the veterans' program even though somewhat curtailed. Therefore, the time had clearly arrived which is described in the Act thus: ". . . as soon as revenues collected through the tax imposed by this Act will permit . . . "; in other words, allow, let, suffer, or endure.

Therefore, at the time in question discretion was not needed, but only an unselfish observance of a clearly defined duty. The hypothetical question as to the need for discretion if the Territory had proceeded prematurely has nothing to do with the case. Quotations from the Act in appellants' brief on pages 12 and 13 thereof do not alter the effect of the mandatory words on the specific subject of repayment. Certainly the Board has power to "formulate general policies" on whether to run a strict banking loan program or a liberal loan program etc. and to adopt rules and regulations binding upon its executive officer, but it may not alter the law under which it operates through the guise of policy making. To hold otherwise would be to permit extremely uncooperative treatment of the Territory to the detriment of the general public by the very creature it created.

Of course, every administrative officer or board has to read the statute under which it operates to ascertain its powers, functions and duties and may perhaps invoke some elements of statutory construction. On this point we find in 34 *Am. Jur.* P. 913, Sec. 133, as follows:

> "In many cases public officials may have to resort to statutes to ascertain the character and extent of their duties. That this may be necessary in a particular case does not necessarily deprive the duty of its ministerial character so as to prevent enforcement by mandamus. So, in applying the rule stated in the preceding section, that mandamus will issue to compel executive officers to perform their ministerial duties, the fact that the particular duty in question requires the interpretation of the law by the executive officer does not ordinarily prevent issuance of the writ . . . . "

The opposite has also been held, as shown by the last sentence of said section, but that text is supported by a very old case. It reads as follows:

> "On the other hand, it has been held that mandamus will not issue to compel an executive officer to perform an act when the duty of performing it depends on the construction of a statute, and the officer has construed it as not requiring him to perform the act, although the court may be of the opinion that his construction of the statute is incorrect."

The main text is supported by the case of *Miguel v. McCarl, Comptroller General et al,* 291 U.S. 442, decided by the Supreme Court on March 5, 1934. The Court holds that

> "Where the duty to make a payment of public money is imposed so plainly by statute as to leave no play for judgment or discretion, the duty is purely ministerial and its performance may be compelled by mandamus or mandatory injunction."

In said case the Court held that the duty pre-

scribed by statute was so clear as to warrant granting of relief even though the Comptroller General had previously construed the law to the opposite effect. This repudiates the older view that the Court will not interfere to enforce performance of a duty where administrative interpretation has been rendered even if wrong. In discussing the matter, the Court cited with approval the case of *Roberts v. United States*, 176 U. S. 221, and quotes the opinion in that case as follows:

> " 'The opinion points out (p. 231) that every such statute to some extent requires construction by the officer; that he must read the law and, therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is required to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired.' This view of the matter has been uniformly approved in subsequent decisions. See, for example, *Lane v. Hoglund*, 244 U. S. 174, 181; *Wilbur v. Krushnic*, 280 U. S. 306, 318."

The propriety of considering the public interest in this case is established by reference to 113 *A. L. R.* 210, where numerous cases are cited. The general principle was stated by Mr. Justice Brandeis in *Duncan Townsite Co. v. Lane* (1917), 245 U.S. 308,

> "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief, or will be within the strict letter of the law, but in disregard of its spirit."

SUMMARY

1. The Alaska mandamus statute is liberal in its terms and does not require that a duty be clothed with strict ministeriality in order to be enforceable by mandamus.

2. The duty of the Veterans' Board to make repayment to the Territory in accordance with the writ issued by the Court below is clear.

3. Consideration of the public welfare emphasizes the mandatory nature of the words "shall pay back such sum to the territorial treasury as soon as revenues collected through the tax imposed by this Act will permit . . . . " The language "but not later than four years after the effective date hereof" simply fixes an outside limit without detracting from the full meaning of the mandatory words under the facts and circumstances.

4. The courts will enforce a duty which is clearly established even though an administrative officer has interpreted the statute in question in derogation thereof.

5. That the money derived and to be derived under the veterans' tax which is affected by the writ issued by the Court below constitutes the great bulk of all such money, easily "permitting" payment of the $350,000.00 to the General Fund of the Territory.

Respectfully submitted,

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